

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-6149

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
SOLOMON COOPER

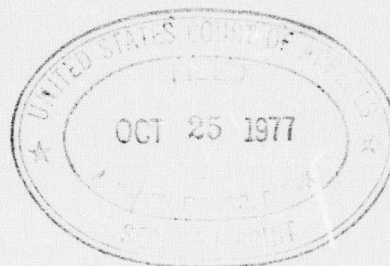
Appellant

- v -

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD

Appellee
-----X

10/25
B
P/S
Docket No. 77-6149



APPELLANT'S BRIEF + APPENDIX

PAGINATION AS IN ORIGINAL COPY

Subsequent to Appellant's having established his eligibility with a rating of 83.4 on the Junior Federal Assistant examination given on June 6, 1973, he received a phone call from someone in Internal Revenue Service (IRS) in Brooklyn - falsely representing herself to be from Western Union - informing him that she had a "Mailgram" for him, instructing him, if interested in a position of Revenue Representative with IRS, to call Miss Costello of that office and arrange for an interview. Appellant, complying, an interview was set up for October 1, 1973, and took place on that date. Appellant has never learned the outcome of that interview. When he phoned Miss Costello inquiring about it, she informed him "if you haven't heard, it's still open."

On July 14, 1975, Appellant filed a complaint of age discrimination. Consequent to this filing, an investigation was conducted by Mr. Paul A. Howard, EEO Investigator, at IRS's Brooklyn facility. The investigation was conducted on or about July 29-30, 1975. The record of this investigation was withheld from him despite his entitlement to it, and his many requests for it.

Under date of October 24, 1975, Appellant received a letter from the Office of the Secretary of the treasury informing him that: "Mrs. Thompson has recommended that your complaint be rejected on the basis that when the alleged act of discrimination took place, the Age Discrimination in Employment Act of 1967, as amended on May 1, 1974, to include the Federal Government, was not in effect."

On October 31, 1975, Appellant submitted his appeal to the Appeals Review Board of the U. S. Civil Service Commission. In it, among other things, he wrote: " . . . and so, I repeat, on this day, October 31, 1975, 'Since I haven't heard to this day, I must assume that "it is still open."' And thus the legal discriminatory denial dates from October 1973. And the illegal discriminatory denial sets in, if you will, on May 1, 1974. Then, as of May 1, 1974, I have been and still am, age-discriminatorily job-denied in prima facie contravention of the Age Discrimination in Employment Act of 1967, as amended May 1, 1974."

Under date of May 13, 1976, the Appeals Review Board ruled: " . . . the only evidence that you were interviewed on October 1, 1973 for the position of Revenue Representative is your statement to that effect." And Further, "Therefore, the Board affirms the agency's decision of October 24, 1975, rejecting your complaint of age discrimination "

Pursuant to the advice of the aforementioned letter, "If you are not satisfied with this decision, you are authorized . . . to file a civil action in an appropriate U. S. District Court." In the ensuing action, which appellant filed, he stated: "And it appears to me very unlikely that both the agency and the commission couldn't, if they were so inclined, discover rules, regulations and laws whose purport and purpose was precisely the prevention of the kind of wrongs done me in this instance"

And he added, "A further basis of this appeal is the omission of the agency to obtain permission not to hire a disabled veteran."

Countering appellant, Appellee filed a motion to dismiss; contending, " . . . that plaintiff is not afforded protection by the Age Discrimination Act." The Court felt that, in the words of its Memorandum and Order (M&O), " . . . Since disposition of the motion appeared to rest, at least in part, on a factual determination of whether plaintiff was interviewed and considered for employment on October 1, 1973, an evidentiary hearing was held . . ." Appellant is herein appealing the Court's findings as a result of this hearing with respect to whether or not there was discrimination, whether or not it is continuing and whether or not he is afforded protection under the Fifth and Fourteenth Amendments.

The appeal is based on Appellant's belief and contention that the Court's Memorandum is based on a fundamental error and is riddled with contradiction. Furthermore, its patently indulgent construction of Appellee's admitted misfeasance (all records missing); entailing, as it does, rejection of Appellant's discrimination-charge (as being merely "bureaucratic morass") smacks of partiality.

At the very outset of the Court's M&O, it is stated, "Plaintiff pro se Solomon Cooper's complaint charges the United States Civil Service Commission with violating 29 USC Par 621 et seq.

This is the fundamental error. Appellant never made such charge. It was Appellee who cited the law in their self-exoneration of Appellant's complaint of age discrimination. In their letter of rebuttal dated January 6, 1976 (in the administrative part of these proceedings) the law was cited for the first time; declared to be prospective only, and accompanied by the following comment, " . . . Though age discrimination prior to this date might be reprehensible, such discrimination was not in violation of any laws." And despite the fact that Appellant alluded to other laws, albeit not specifically, that should apply, all subsequent considerations of this matter were conducted with respect to the Age Discrimination in Employment Act only.

The charges Appellant did make in support of his civil action were that the ruling of the Appeals Review Board, " . . . The only evidence that you were interviewed on October 1, 1973 . . . is your statement to that effect," was in error. The second charge was, "A further basis of this appeal is the omission of the agency to obtain permission (of the Civil Service Commission) not to hire a disabled veteran."

The Court found (1): " . . . the testimony of plaintiff Cooper to be credible and conclude that he was interviewed for the position of Revenue Representative for the IRS on October 1, 1973." And (2): " . . . since there has been no violation of 29 USC Par 633a, and consequently no basis for this Court's

jurisdiction, defendant's motion is granted and plaintiff's complaint is dismissed." (M&O page 11).

As to Appellant's claim of discrimination and its being of a continuing nature, the Court arrived at three conclusions:

1 - " . . . Mr. Cooper was simply 'lost' in a bureaucratic morass rather than discriminated against . . ." (M&O page 9).

2 - " . . . once all positions were filled, defendant's failure to hire the plaintiff, even if originally prompted by discrimination, was the result of no job openings . . ." (M&O - 10-11)

3 - " . . . To avoid the time bar of the statute plaintiff contends that the alleged discrimination practiced against him is of a continuing nature. The claim is without merit." (M&O Pg. 10)

With respect to (1) there was never any claim in either Appellee's pleadings, nor in any of the government witnesses' testimony, nor for that matter, by any of the affiants of the administrative investigation to the effect that they were deluged with work and that that was the explanation for what did or did not happen. Appellant submits that the Court's unwarrantedly exculpatory " . . . fair interpretation of the documents produced at the hearing . . ." is not the least bit consonant with the conclusion that " . . . Mr. Cooper was simply 'lost' in a bureaucratic morass . . . (M&O pages 8-9). Being swamped with work might explain delay. Never 'loss!' The failure to explain - whatever the reason therefor - cannot and

should not become the explanation itself.

Appellant introduced in evidence (plaintiff's exhibit in evidence "3") a document which recaptulated the actions taken by the Civil Service Commission with respect to a number of applicants on two registers forwarded to them. It records that of seven "non-selectees," six were given three "considerations," while Appellant, the only "preference-eligible" "non-selectee" on the two registers was given but one. With respect to this glaring omission, he testified, " . . . blatant, undisguised discrimination is writ stark and unmistakable in this 'accounting' . . . I, the only 'preference-eligible' non-selectee was given only one consideration, despite the fact that I might have been entitled to six - three for being the first of three and an additional three by virtue of my preference-eligibility."

Appellant attempted, in vain, to induce the Court to consider this discrimination under laws other than USC Par 621 et seq; contradicting the assertion in the M&O that Appellant was charging under it. He prayed the Court, at the hearing, " . . . to proceed pursuant to 42 USC Par. 1983, which reads as follows: Every person who under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress." The Court responded, "I can't." But then added, "I'll give you another one that does the same thing." (Again, in light of this renege, the M&O opening statement is indeed baffling!) M&O, too, never did bother to explain neither the "inability" nor the omission.

But, the prohibition against discrimination by the Federal Government based upon the due process clause of the Fifth Amendment was judiciously recognized in *Bolling v Sharpe* 347 U.S. 497, S.Ct. 693, 98 L.Ed. 884 (1954).

With respect to (2), the Court apparently buttressed its findings with the testimony of Ms Hendler to the effect that, " . . . the list of appointments to the position was filled on November 29, 1973." Counsel, in this connection, introduced evidence consisting of two plain sheets of paper bearing, handwritten, the titles "Competitive Appts. to Rev Rep" on one; and on the other "Non-Competitive Appts. to Rev Rep." The former, contains a handwritten list of eight names and dates, the latest one, "10/30/73." And beneath the last name the notation, "Last position filled." The other sheet has a list of three names and dates. Making altogether a total of eleven names. But the originating requisition, which prompted submission of Appellant's name to IRS, was for fifteen Revenue Representatives. Thus leaving four jobs unfilled on this requisition. In all Appellee introduced three certificates requesting Revenue Representatives, fifteen under certificate number "C73-3305, dated Aug 30, 1973;

twelve under certificate number "C73-3305(?)" dated 9-11-1973; and fifteen under certificate number "C73-3305B" dated SEP 20, 1973. Making a grand total of forty-two Revenue Representatives requisitioned. Yet IRS reported to the Civil Service Commission, on these certificates, that as of Feb. 26, 1974, they had appointed a total of but six. Leaving, it would appear, a round three dozen jobs unfilled as of that date.

Despite this M&O observes (Page 9), " . . . Any alleged discrimination must have occurred either at the interview of October 1, 1973 or sometime between the date of the interview and the date when all the positions for Revenue Representative were filled, November 26, 1973." And further the Court goes on (M&O Pages 10-11), " . . . Once all the positions were filled, defendant's failure to hire plaintiff, even if originally prompted by discrimination, was the result of no job openings." Appellant submits that to maintain, post facto, after having requisitioned for forty-two "vacancies," that they had actually only had eleven; is a spurious ruse. And, if such a bald-faced dodge is permitted, Appellant should be allowed to plead that on second thought he feels that the discrimination was due to religion and was cognized under the subject statute at that time.

Appellant rested, and rests his cause on legal grounds. In his written testimony, which he read from the witness stand, he stated, " . . . Civil Service Form 62-105 (entitled) Statement of Reasons for Passing Over a Preference-Eligible, contains

the following instructions: " . . . the non-preference eligible selected may not legally be entered on duty unless the commission finds that the reasons for passing over the preference-eligible are sufficient, or unless a vacancy is reserved for the preference-eligible pending receipt of the commission's decision." But IRS never did send 62-105, with reference to Appellant, to the commission; let alone receiving it back granting said permission. Consequently, all the jobs held by non-preference eligibles are not legally filled. And thus legally open to this day!

In this connection the Federal Personnel Manual states: (332-20) "An appointing Officer may not pass over a preference-eligible and select a non-preference eligible unless he submits reasons which the commission finds are sufficient to warrant the passover." It was in order to evade this requirement that IRS, Appellant submits, resorted to the deliberate abortion of the hiring procedure with respect to him; and fostered in him the conviction that he was the victim of discrimination.

It should also be noted that this "indefinite suspension" of the hiring procedure, of which the interview was but a part, is prima facie denial of due process in violation of the Fourteenth Amendment.

Appellant considers further that his property was taken from him without due process in violation again of the Fourteenth Amendment. In that, in taking a civil service examination

he feels that he enters upon an implied aleatory contract with the government. And, if his fortune holds, and the mark he attains places him high enough on the resultant list so that jobs are not exhausted prior to his name being reached, the job, when his turn comes, is his! (Else who would ever bother to take a civil service examination?)

With respect to (3), the Court apparently supports its "no merit" finding with the rejection of " . . . plaintiff's theory, once any discriminatory act had occurred it would always be a continuing act and consequently would violate any subsequently enacted statute regardless of the date of the discriminatory act or the effective date of the statute." (M&O Page 10). Appellant proffered no such theory! He rests his insistence that the discrimination is continuing on his testimony at the evidentiary hearing and on the legal grounds specified therein and on those cited herein.

In Appellant's brief initiating his civil action, stated:
" . . . and it appears to me very unlikely that both the agency and the commission couldn't, if they were so inclined, find rules, regulations and/or laws whose purport and purpose was precisely the prevention of the kind of wrongs done me in this instance . . . "

And in his pleadings, he cited and quoted extensively from 408 U.S. 564 (which is also cited as 92 S.Ct. 2701 (1972)). The

comments, with respect to the due process clause of the Fourteenth Amendment, were so incisively and unequivocally enunciated therein that, issuing from that august tribunal, the highest court in the land, it cannot but have the force and effect of law. The subject comments and observations mandate, in Appellant's view, freedom from discrimination of all kinds. And thus, in establishing it as an inalienable right, it properly orients USC Par 621 et seq as being but a new remedy and not a new right. This was what he hoped to convince the Court of when, in his pleadings, he quoted so extensively from the remarks of Mr. Justice MARSHALL. Whether or not it proved persuasive with respect to age discrimination; it is the law of the land, as Appellant sees it, with respect to property rights and due process, and to due process in general.

A reiteration of the above mentioned comments and observations should make that abundantly clear. Mr. Justice MARSHALL declared, in the case cited (supra): " . . . The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling - i.e. federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory or contractual controls, a government employer is different. The government may only act fairly and reasonably.

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This Court has long maintained that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (Hughes,). See also *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be 'discharged at any time for any reason or for no reason'

"In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is his 'property' right that I believe is protected by the Fourteenth Amendment and that cannot be denied 'without due process of law.' And it is also liberty - liberty to work - which is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment."

"This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See e.g. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185, 71 S.Ct. 624, 655, 95 L.Ed. 817 (1951) (Jackson J., concurring); *United States v. Lovett*, 328, U.S. 303, 316-317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252 (1946). Thus, when an application for public employment is denied . . . the government must say why, for

it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action."

"Employment is one of the greatest, if not the greatest, benefits that governments offer in modern day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action."

"Mr. Justice Douglas has written that: 'It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.'"

"And Mr. Justice Frank furter has said that 'the history of American freedom is, in no small measure, the history of procedure.' *Malinski v. New York*, 324 U.S. 401, 414, 65 S.Ct. 781, 787, 89 L.Ed. 1029 (1945) (separate opinion). With respect to occupations controlled by the government, one lower court has said that 'the public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process;

absolute and uncontrolled discretion invites abuse.' Hornsby v. Allen, 326 F. 2d 605, 610 (CA5 1964)."

"It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. See e.g. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). the short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied . . . there should be some reason for the decision. It scarcely can be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary . . . moreover proper procedure will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. 'Experience teaches . . . that the affording of prpcedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring.' Silver v. New York Stock Exchange, 373 U.S. 341, 366, 83 S.Ct. 1246, 1262, 10 L.Ed.2d 389 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful and correct."

"Professor Gellhorn put the argument well:

'In my judgment there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice Jackson in saying: "Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best assurance for the government itself against those blunders which leave lasting stains on a system of justice" -- blunders which are likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own . . .'" Summary of colloquy on administrative law, 6 J. Soc. Pub. Teachers of Law, 70, 73 (1961).

In conclusion, Appellant submits that to continue to deny him his job, and the accrued back pay, without furnishing reasons therefor - whether the reasons are lacking through accident or design - deprives him of his property without due process in violation of the Fourteenth Amendment. The fact, or rather the Court's unwarranted assumption of the fact, that " . . . Mr. Cooper was simply 'lost' in a bureaucratic morass . . . " does not absolve either the agency or the commission from responsibility for Appellant's grievance nor the obligation to redress such grievance.

Copies of evidence Appellant
makes reference to in his brief.

Docket No. 77-6149

Competitive Appts to Sec Reg.

Name	COB	DOB
Harold Albrighton	10/9/73	10/6/12
Mitchell Baum	10/9/73	7/1/62
Janet Evans	10/9/73	11/20/39
Pamela Logan	10/9/73	8 ⁴ /13/53
Julie Leonard (Castroville)	10/9/73	10/2/49
Juan Muñoz	10/24/73	7/24/49
Elise McFarland	11/26/73*	1/25/57
Sanford Stone	12/30/73	7/9/36

Last position filled.

Wm. Conington. Sept. 1 - 1880

Name	1880	1881
Maryland Conington	07-30-73	11-7-73
Bertha Cooper (now Brown)	09-16-72	06-01-73
Jack Green	09-16-73	11-20-31

CERTIFICATION FORM

CERTIFICATE NO. 73-3305

DATE ISSUED AUG 20 1973

I. REQUEST

DEPARTMENT OR AGENCY

BUREAU OR FIELD ESTABLISHMENT

REQUEST NO.

TREASURY

INTERNAL REVENUE SERVICE

DATE 73-65
3-16-73

U.S. CIVIL SERVICE COMMISSION
NEW YORK CITY AREA OFFICE
FEDERAL BUILDING - 26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

This request should be submitted to the office of the Commission having jurisdiction over the work location named unless special prior agreement has been reached with the Commission.

(212) 264-9378

VACANCIES, POSITION TITLE, SERIES CODE, GRADE (SALARY, IF UNGRADED) AND DUTY LOCATION

15 REVENUE REPRESENTATIVES, CS-592-4 BROOKLYN DISTRICT

TYPE OF APPOINTMENT-

- ☒ Career or Career-Conditional
☐ Temporary not to Exceed

TO WHAT EXTENT WILL PERSONS APPOINTED BE REQUIRED TO TRAVEL?

☐ NOT AT ALL ☐ OCCASIONALLY ☐ FREQUENTLY

- ☐ D-FOR FILLING DEPARTMENTAL POSITIONS ONLY
☒ F-FOR FILLING FIELD POSITIONS ONLY

REQUEST RELATES SOLELY TO REQUIREMENTS OF THE MERIT PROMOTION PROGRAM

AVAILABLE FOR WORK:

☐ ☒ IMMEDIATELY ☐ BY _____

REMARKS: (Give a description of duties where no standard specifications are published, and indicate any special qualifications required)

NO DISPLACED EMPLOYEES

36 ppts
APPROVED

EMC MAR 11 1974

ADDRESS WHERE CERTIFICATE IS TO BE SENT:

DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE
P.O. BOX 380 - GPO
BROOKLYN, NEW YORK 11202

FOR FURTHER INFORMATION CONTACT:

(Name) J. CARRY (Tel. 596-4977)

APPROVED BY: ACTING CHIEF,
(Name) EDNA MANNING PERSONNEL BRANCH
(Title)

II. CERTIFICATION

Please Review Instructions on Back of Form

TO REQUESTING OFFICE:

- ☒ The attached list of eligibles is provided in response to the above request.
PLEASE RETURN WITHIN 21 DAYS OF DATE ISSUED OR BY SEP 20 1973
☐ Authority is granted to recruit through the open competitive examination for appointment to the position(s) indicated above.
Applications of persons recruited should be FORWARDED WITHIN 30 DAYS OF DATE ISSUED OR BY
☐ Authority is granted to fill the position(s) identified above under CS Reg. 316.402(A).

NEW YORK
RECEIVED
MAR 11 1974

III. REPORT

Please Review Instructions on Back of Form

TO THE ISSUING OFFICE: Report on certificate is submitted and original applications (and attachments) of eligibles not selected for appointment returned.

☐ WE DESIRE FURTHER CERTIFICATION FOR _____ VACANCIES.

SIGNATURE OF APPOINTING OFFICER

Frank Ramogido

TITLE

Chief, Personnel Branch

DATE

Feb. 26, 1974

STANDARD FORM 39 (Revised)
U.S. CIVIL SERVICE COMMISSION
JULY 1971 - FPM 322

CERTIFICATION FORM

CERTIFICATE NO.

673-3205 53 B

DATE ISSUED

SEP 20 1973

I. REQUEST

DEPARTMENT OR AGENCY

Treasury

BUREAU OR FIELD ESTABLISHMENT

Internal Revenue Service

REQUEST NO.

phone

DATE

9/11/73

This request should be submitted to the office of the Commission having jurisdiction over the work location named unless special prior agreement has been reached with the Commission.

VACANCIES, POSITION TITLE, SERIES CODE, GRADE (SALARY, IF UNGRADED) AND DUTY LOCATION

15 Persons Representatives, GS 992-4 Brooklyn, NY. Dist.

TYPE OF APPOINTMENT

☒ Career or Career-Conditional

☐ Temporary not to Exceed

TO WHAT EXTENT WILL PERSONS APPOINTED BE REQUIRED TO TRAVEL?

☐ NOT AT ALL

☐ OCCASIONALLY

☐ FREQUENTLY

☐ D—FOR FILLING DEPARTMENTAL POSITIONS ONLY

☒ F—FOR FILLING FIELD POSITIONS ONLY

REQUEST RELATES SOLELY TO REQUIREMENTS OF THE MERIT PROMOTION PROGRAM

☐

AVAILABLE FOR WORK:

☒ IMMEDIATELY

☐ BY

REMARKS: (Give a description of duties where no standard specifications are provided, and indicate any special qualifications required)

NO DISPLACED EMPLOYEES

EMC MAR 11 1974

ADDRESS WHERE CERTIFICATE IS TO BE SENT:

Department of Treasury
Internal Revenue Service
P.O. Box 380 GPO
Brooklyn, New York 11202

FOR FURTHER INFORMATION CONTACT:

B. Carey

(Name)

576-6977

(Tel.)

APPROVED BY:

Acting Chief, Personnel

(Name) John H. H. H.

(Title) Director

II. CERTIFICATION

Please Review Instructions on Back of Form

TO REQUESTING OFFICE

☒

The attached list of eligibles is provided in response to the above request. PLEASE RETURN WITHIN 21 DAYS OF DATE ISSUED OR BY

OCT 11 1973

☐

Authority is granted to recruit through the open competitive examination for appointment to the position(s) indicated above. Applications of persons recruited should be FORWARDED WITHIN 30 DAYS OF DATE ISSUED OR BY

☐

Authority is granted to fill the position(s) identified above under CS Reg. 316.402(A).

III. REPORT

Please Review Instructions on Back of Form

TO THE ISSUING OFFICE

Report on certificate is submitted and original applications (and attachments) of eligibles not selected for appointment returned.

☐

WE DESIRE FURTHER CERTIFICATION FOR VACANCIES.

SIGNATURE OF APPOINTING OFFICER

John H. H. H.

TITLE

Chief, Personnel Branch

DATE

Frb. 26, 1973

I. REQUEST

DEPARTMENT OR AGENCY

BUREAU OR FIELD ESTABLISHMENT

REQUEST NO.

Secretary

Internal Revenue Service

7-43

2-11-73

U.S. Civil Service Commission
New York City Area Office
Federal Building
26 Federal Plaza
New York, New York 10007

This request should be submitted to the office of the Commission having jurisdiction over the work location named unless special prior agreement has been reached with the Commission.

(212) 264-2376

VACANCIES, POSITION TITLE, SERIES CODE, GRADE (SALARY, IF UNGRADED) AND DUTY LOCATION

TYPE OF APPOINTMENT

12 Revenue Representatives GS-592-4 Brooklyn District

☒ Current or Career-Conditional
☐ Temporary not to exceed

TO WHAT EXTENT WILL PERSONS APPOINTED BE REQUIRED TO TRAVEL?

☐ D—FOR FILLING DEPARTMENTAL POSITIONS ONLY
☒ F—FOR FILLING FIELD POSITIONS ONLY

☐ NOT AT ALL ☐ OCCASIONALLY ☐ FREQUENTLY

REQUEST RELATES SOLELY TO REQUIREMENTS OF THE MERIT PROMOTION PROGRAM

AVAILABLE FOR WORK:

☐

☒ IMMEDIATELY

☐ BY

REMARKS: (Give a description of duties where no standard specifications are published, and indicate any special qualifications required)

This confirms telephone conversation of 9-11-73 between Ms. Canaday of your office and Ms. Hendler this office.

10/11/73
APPROVED
NO
10/11/73

ADDRESS WHERE CERTIFICATE IS TO BE SENT:

FOR FURTHER INFORMATION CONTACT:

Department of Treasury
Internal Revenue Service
P.O. Box 380 - CPO
Brooklyn, New York 11202 ATT: Chief, Personnel

(Name) R. Hendler (Tel) 596-4977
APPROVED BY: Chief, Personnel Branch
(Name) Frank Samorido (Title)

II. CERTIFICATION

Please Review Instructions on Back of Form

TO REQUESTING OFFICE:

- ☒ The attached list of eligibles is provided in response to the above request. PLEASE RETURN WITHIN 21 DAYS OF DATE ISSUED OR BY 001 10 1973
- ☒ Authority is granted to recruit through the open competitive examination for appointment to the position(s) indicated above. Applications of persons recruited should be FORWARDED WITHIN 15 DAYS OF DATE ISSUED OR BY 001 10 1973
- ☐ Authority is granted to fill the position(s) identified above under CS R-1 316 102(A).

III. REPORT

Please Review Instructions on Back of Form

TO THE ISSUING OFFICE: Report on certificate is submitted and original applications (and attachments) of eligibles not selected for appointment.

☐ WE DESIRE FURTHER CERTIFICATION FOR VACANCIES

SIGNATURE OF APPOINTING OFFICER

TITLE

DATE

Frank Samorido

Chief, Personnel Branch

Feb. 26, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

SOLOMON COOPER,

DOCKET NO. 76 C 1053

Plaintiff,

- against -

UNITED STATES CIVIL SERVICE
COMMISSION APPEALS REVIEW BOARD,

MEMORANDUM AND ORDER

Defendant.

- - - - - x

PRATT, J:

Plaintiff pro se Solomon Cooper's complaint charges the United States Civil Service Commission with violating 29 USC §§621 et seq. Specifically, Mr. Cooper alleges that he was discriminatorily denied employment with the Internal Revenue Service (IRS) after interviews on October 1, 1973 for one position (Revenue Representative) and on December 6, 1973 for another (Taxpayer Service Clerk) because of his age which plaintiff alleges to be over "40 and not yet 65". Hearing of February 18, 1977, P Ex. 4. By motion filed September 20, 1976, the government moved to dismiss the complaint pursuant to FRCP 12(b) on the grounds that it failed to state a claim for which relief could be granted and that this court lacked subject matter jurisdiction.

When the motion came on for argument on December 10, 1976, however, the Assistant United States Attorney (AUSA) representing the government advised the court that defendant wished to adjourn the motion to dismiss -- a request which, on plaintiff's consent, was granted. As the AUSA explained in a letter dated December 15, 1976:

At the hearing of the defendant's motion to dismiss plaintiff's complaint on December 10, 1976 counsel for defendant noted that plaintiff, who is appearing pro se, had submitted a reply memorandum to defendant's motion that contained several new "facts" which may have created a cause of action unrelated to the Age Discrimination Act which forms the basis of plaintiff's present complaint. Counsel advised the Court that no administrative record had been received which would enable the United States Attorney's office to reply to the charges contained in plaintiff's reply brief. We have now received the record and enclose a copy herewith. It contains, inter alia, the following information:

- 1) Plaintiff was advised to schedule an interview for the position of Revenue Representative or Taxpayer Service Representative not later than September 28, 1973.
- 2) Plaintiff failed to arrange for such an interview and plaintiff was not, in fact, interviewed on October 1, 1973.
- 3) Plaintiff was interviewed for the position of Taxpayer Service Clerk on December 6, 197[3] and was not selected for that position by the interviewing committee.

- 4) A very thorough investigation was conducted by Paul Howard, Equal Employment Opportunity Investigator for the Internal Revenue Service. He found that the Internal Revenue Service had followed proper procedures and had not discriminated against plaintiff.

The government forwarded a copy of the investigative report referred to in its letter to Mr. Cooper and renewed its motion to dismiss.

I

Briefly stated, the government took the position that: 1) there was no interview of plaintiff on October 1, 1973 for any IRS position and, therefore, there could be no age discrimination involved in failing or refusing to employ him; and 2) since plaintiff was rejected on December 26, 1973 for the position for which he was interviewed on December 6, 1973, any discrimination against plaintiff occurred prior to the effective date of 29 USC §§621 et seq. Plaintiff Cooper, on the other hand, while conceding that recovery for the December 26, 1973 rejection is barred, Plaintiff's Rejoinder to Motion to Dismiss at 11, insists that he was also interviewed on October 1, 1973, that he was never informed of the outcome of that interview, and that because of age discrimina-

tion he continues to be denied the employment for which he was interviewed. Since disposition of the motion appeared to rest, at least in part, on a factual determination of whether plaintiff was interviewed and considered for employment on October 1, 1973, an evidentiary hearing was held before the undersigned on February 18, 1977. The following represents the undersigned's findings of fact and conclusions of law based on the testimony and documents presented at the hearing.

II

In the papers submitted to the court both before and at the hearing, plaintiff maintained that on June 6, 1973 he took and passed the Junior Federal Assistant civil service examination and that on or about September 27, 1973 he received a phone call instructing him, if interested in the position of Revenue Representative with IRS, to call a Miss Costello and arrange for an interview. According to Mr. Cooper, he complied by arriving for an interview in the Brooklyn IRS offices on October 1, 1973 as arranged through Miss Costello and by filling out the employment forms previously forwarded by her. Moreover, "I [Cooper] * * * was interviewed on that date in Room 215 by two women and a man. The male panelist, whose name I positively recollected when

it was repeated to me during the course of the IRS investigation of this subject matter, was Mark Bernstein. The two women's names, [were] Ida Mason and Marie Cox * * *. I have yet to learn the outcome of this interview." Plaintiff's Statement of February 18, 1977 (P Ex. 4).

III

Presented with these allegations that an interview had taken place on October 1, 1973, the government called Roberta Hendler, Nancy Costello, Mark Bernstein, and Marie Cox to testify at the hearing.

Roberta Hendler, Personnel Staffing Specialist at the Brooklyn IRS office, testified that she supervised the hiring procedures for the Taxpayer Service Division, which includes Revenue Representatives, for the period including October 1973. Ms. Hendler testified as to the standard hiring procedures in general and to Mr. Cooper's claims in particular. According to the records as described by Ms. Hendler, although Mr. Cooper apparently was sent a telegram concerning the job of Revenue Representative (she testified that telegrams were sent rather than phone calls made), the Civil Service certificates for the position retained by the IRS indicated, by the

hand written code "FR" alongside his name, that Mr. Cooper failed to respond to the telegram informing him of the position opening. Ms. Hendler had no independent recollection of Mr. Cooper, and said that she was unable to find many of the documents relating to the October 1973 applications and interviews for the Revenue Representative position. Finally, she testified that the list of appointments to the position was filled on November 29, 1973.

Nancy Costello, Personnel Staffing Specialist with IRS in 1973, testified that she, too, had responsibility for hiring during the period in question and scheduled interviews for applicants as part of that responsibility. Although she identified her signature and initials on the documents relating to the December 1973 interview and application, she testified that she did not recall speaking to or seeing Mr. Cooper in December 1973; nor did she recall speaking to or seeing Mr. Cooper in October 1973.

Mark Bernstein testified that in October 1973 he was the Acting Chief, Interview Section, Office Branch, at IRS and that he participated as an interview panel member in substantially all the hirings of Revenue Representatives. Although Mr. Cooper alleged that Mr. Bernstein was a member

of the panel who had interviewed Mr. Cooper, and although Mr. Bernstein acknowledged that he did sit on an interview panel on October 1, 1973, Mr. Bernstein had no recollection of ever seeing Mr. Cooper.

While Marie Cox, Taxpayer Service Specialist, recalled sitting in October of 1973 on interview panels with Mark Bernstein and Ida Mason, now retired, she did not remember interviewing Mr. Cooper, nor did she recognize him as an applicant whom she may have interviewed.

IV

In addition to cross-examining these four witnesses in an attempt to refresh their recollection and/or attack their credibility, Mr. Cooper took the witness stand himself and read a well-prepared, articulate statement which recounted his claim that he had been called and interviewed for the position of IRS Revenue Representative on October 1, 1973.

V

Significantly, none of the government witnesses testified definitively, nor could they, that Mr. Cooper had not been interviewed on October 1, 1973.

Neither Mr. Bernstein nor Ms. Cox remembered Mr. Cooper. Nor could they be expected to, after interviewing thousands of applicants. Similarly, after processing thousands of applicants, Miss Costello could not be expected to, nor did she, specifically recall seeing or speaking to Mr. Cooper. Moreover, Ms. Hendler testified that some documents relating to this interview period were no longer in the IRS files and could not be found.

By way of contrast, Mr. Cooper had a positive recollection of having been interviewed on October 1, 1973. His description of the procedures, the panel, and his firm recollection of the events surrounding the interview strongly support his testimony. In short, I find the testimony of plaintiff Cooper to be credible and conclude that he was interviewed for the position of Revenue Representative for the IRS on October 1, 1973.

VI

The finding that plaintiff was interviewed on October 1, 1973 for the position of Revenue Representative, however, does not mean that he was denied this position in violation of 29 USC §§621 et seq. Factually, a fair interpre-

tation of the documents and testimony adduced at the hearing would indicate that Mr. Cooper was simply "lost" in a bureaucratic morass rather than discriminated against. Moreover, from a legal point of view, even if an act of age discrimination had occurred against plaintiff with respect to this position, it must have occurred before the effective date of the statute prohibiting age discrimination in federal employment.

As of May 1, 1974, 29 USC §733a proscribed discrimination on the basis of age in all matters, including hiring, relating to employment in and by the federal government. For instances of alleged discrimination occurring before May 1, 1974, the Civil Service Commission has interpreted 29 USC §633a to be applicable under two additional circumstances: 1) if the complaint was the subject of pending administrative proceedings on May 1, 1974; or 2) if the complaint was filed after May 1, 1974 based on alleged discrimination occurring within 30 days immediately preceding May 1, 1974. Memorandum from Ass't Exec. Director of Civil Service Commission to Directors of Equal Employment Opportunity Commission, July 29, 1975. Any alleged discrimination must have occurred either at the interview of October 1, 1973 or

sometime between the date of the interview and the date when all the positions for Revenue Representative were filled, November 26, 1973. Viewing plaintiff's complaint most favorably, then, November 26, 1973 is the latest date on which a discriminatory act could have occurred. Since plaintiff did not file a complaint until May 14, 1975, some 17 months later, he falls within neither of the Commission's exceptions to the May 1, 1974 effective date of 29 USC §633a's applicability to federal hiring.

To avoid the time bar of the statute plaintiff contends that the alleged age discrimination practiced against him is of a continuing nature. The claim is without merit. See Woodburn v. LTV Aerospace Corp., 531 F2d 750 (CA5 1976); Powell v. Southwestern Bell Telephone Co., 494 F2d 485 (CA5 1974). To hold otherwise would be to make meaningless the effective date of the statute. Under plaintiff's theory, once any discriminatory act had occurred it would always be a continuing act and consequently would violate any subsequently enacted statute regardless of the date of the discriminatory act or the effective date of the statute. See Brown v. GSA, 507 F2d 1300, 1308 (CA2 1974), aff'd, 96 Sct 1961 (1976). Once all the positions were filled, defendant's failure to

hire the plaintiff, even if originally prompted by discrimination, was the result of no job openings. Powell v. Southwestern Bell Telephone Co., supra, 494 F2d at 489.

VIII

In all the proceedings in this matter held before the undersigned, plaintiff Cooper has evidenced a gentlemanly manner and has effectively and articulately advocated his position. Indeed, the IRS would do well to recognize these qualities and renew its consideration of Mr. Cooper for future openings in the agency. Nonetheless, since there has been no violation of 29 USC §633a, and consequently no basis for this court's jurisdiction, defendant's motion is granted and plaintiff's complaint is dismissed.

SO ORDERED.

Dated: Westbury, New York
August 25, 1977.

GEORGE C. PRATT
U. S. DISTRICT JUDGE

ACKNOWLEDGEMENT OF SERVICE

Due service of a copy of Appellant's Brief, Docket No. 77-6149: Solomon Cooper vs United States Civil Service Commission Appeal- Review Board, Appellee on the 25th day of October 1977, upon

U. S. ey
Office P.O. Address
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

is hereby acknowledged.

Office of U. S. Attorney

By *Charlene F. Nelson*

RECEIVED
U. S. ATTORNEY

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